EDITOR'S NOTE

THE FOLLOWING PAGES WERE POOR HARD COPY AT THE TIME OF FILMING. IF AND WHEN A BETTER COPY CAN BE OBTAINED, A NEW FICHE WILL BE ISSUED.

Supreme Court, U.S.
FILED
NOV 21 1986
JOSEPH F. SPANIOL, JR.
CLERK

No. 85-1773

IN THE
SUPREME COURT OF THE UNITED STATES

October Term, 1986

CHARLES M. OBERLY, III and JOHN E. WILSON, III,
Appellants

v.

BALTIMORE & OHIO RAILROAD COMPANY, *et al.*,
Appellees

On Appeal From The United States Court of Appeals For The Third Circuit

APPELLEES' REPLY TO THE BRIEF FOR THE UNITED STATES AS AMICUS CURIAE

DUANE, MORRIS, & HECKSCHER
William E. Manning, Esquire
1220 Market Building
P.O. Box 195
Wilmington, Delaware 19899
(302) 571-5550

PACKARD PRESS / LEGAL DIVISION, 10th & SPRING GARDEN STREETS, PHILA., PA. 19123 (215) 236-2000

TABLE OF CONTENTS

	Page
Statement	1
Argument	3
Conclusion	9

TABLE OF AUTHORITIES

Cases: Page

Association of Am. R.R. v. Costle, 562 F.2d 1310 (D.C. Cir. 1977) ..... *passim*

Baltimore & O.R.R. v. Oberly, 606 F. Supp. 1340 (D.Del. 1985), *aff'd*, 782 F.2d 29 (3d Cir. 1986) 2

Other Authorities:

Noise Control Act of 1972, 42 U.S.C. (& Supp. II) §§4901 *et seq.* 1

§16, 42 U.S.C. §4915..... 4

§17(c)(1), 42 U.S.C. §4916(c)(1) 5, 7

§17(c)(2), 42 U.S.C. §4916(c)(2) 5

44 Fed. Reg. 22,960-22,972 (1979)..... 7

45 Fed. Reg. 1,252 (1980)..... 7

40 C.F.R. pt. 201 (1983)..... 7

118 Cong. Rec. 37,318 (1972)..... 6

Status Report, *Association of Am. R.R. v. Costle*, No. 76-1353 (D.C. Cir. Nov. 12, 1981) 8

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1986

CHARLES M. OBERLY, III and JOHN E. WILSON, III,
Appellants

v.

BALTIMORE & OHIO RAILROAD COMPANY, ET AL.,
Appellees

ON APPEAL FROM THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

APPELLEES' REPLY TO THE BRIEF FOR THE UNITED STATES AS AMICUS CURIAE

This reply brief is filed in response to the brief filed by the Solicitor General of the United States as *Amicus Curiae*.

STATEMENT

At its roots, this case involves the State of Delaware's quarrel with the method for regulating railroad facility noise selected by the Environmental Protection Agency (EPA) pursuant to the Noise Control Act of 1972 (the Act), 42 U.S.C. (& Supp. II) §§4901 *et seq.* Delaware officials have appealed from decisions below holding that, under the Act, the EPA's regulatory scheme, including its decision to reject a regulatory method which Delaware prefers and seeks to impose, preempts Delaware's authority to regulate the same railroad facilities. Appellees have moved to affirm and have demonstrated that, contrary to Appellants' claims, this case involves no important question of federal law; there is no discord

among the circuits concerning any issue in this case and the decisions below were correct.

No further response to Appellants' argument is required.[1] Instead, this brief will respond only to the Brief For The United States As *Amicus Curiae* filed by the Solicitor General on November 10, 1986 (U.S. Brief), which reverses the position taken by his client agency before the court of appeals below.[2] The Solicitor General now seeks a remand "[b]ecause the Court of Appeals may have relied on the position espoused by the government in that court. . . ." U.S. Brief at 13. Appellees note that the district court, in a carefully reasoned opinion, *Baltimore & O.R.R. v. Oberly*, 606 F. Supp. 1340 (D. Del. 1985) (reprinted in Appendix to Jurisdictional Statement at page 1[3]) granted a preliminary injunction unaided by the United States' former or current views and that the court of appeals affirmed "for the reasons noted in Judge Stapleton's opinion." *Baltimore & O.R.R. v. Oberly*, 782 F.2d 29, 30 (3d Cir. 1986), A-20. The EPA's agreement with the district court's conclusions was additionally "note[d]" by the court of appeals only in passing. *Id.* Nevertheless, Appellees offer this response to the U.S. Brief for the sake of completeness.

---

1. The positions of the parties in respect of these issues have been set forth in Appellants' Jurisdictional Statement, Appellees' Motion to Affirm and Appellants' Brief in Reply to Motion to Affirm.

2. The Solicitor General has represented that the United States' current position differs with its position taken one year ago before the court of appeals because of a "regret[able] . . . failure of communication within the Department of Justice." U.S. Brief at 6 n.6. More particularly, the brief filed in the court of appeals was not reviewed by the then-Solicitor General or the Assistant Attorney General for Land and Natural Resources, the latter whose name appears on both briefs. Appellees note that the EPA's General Counsel appears on both briefs as well, although his apparent endorsement of the EPA's position before the court of appeals has not been attributed to a "failure of communication."

3. Herein, all citations to Appendix refer to Appendix in Jurisdictional Statement and shall be in the form "A-__".

ARGUMENT

A. The Solicitor General Apparently Agrees That This Case Involves No Important Questions Of Federal Law.

The Solicitor General's brief announces two new positions: (1) the United States now quarrels with the interpretation of the Act uniformly rendered by the two lower courts as well as the Circuit Court of Appeals for the District of Columbia in *Association of Am. R.R. v. Costle*, 562 F.2d 1310 (D.C. Cir. 1977) (herein *AAR*); (2) the EPA, in its rulemaking, did not have the "preemptive intent" suggested by its statements five years ago to the court in *AAR*.

Appellees believe these new positions to be incorrect on both counts. See *infra* Section C. Before pointing out, however, their differences with the U.S. Brief, Appellees note areas of apparent agreement. The Solicitor General apparently agrees that:

— this case involves no federal constitutional questions;
— this case involves no "threat to federalism", as Appellants have urged; and
— there is no discord among the circuits as to matters involved in this case.

Instead, the issues are reduced under the Solicitor General's new view to questions of statutory interpretation as well as the interpretation of administrative utterances and activities.

B. The United States Now Seeks To Attack Collaterally A Ten-Year-Old Holding Binding Upon a Federal Agency From Which No Appeal Was Taken.

In its initial rulemaking following the enactment of the Act, the EPA assumed it had the discretion to regulate noise from *less than all* railroad equipment and facilities depending upon its view of whether local standards would be appropriate in certain cases. Fearing

the denial of the Act's broad preemptive protection from a hotchpotch of varying and contradictory local regulations, the Association of American Railroads challenged the EPA on this point and petitioned the Court of Appeals for the District of Columbia for relief. That is the only court, under the Act, that may entertain any petition for review of agency actions taken pursuant the Act. Section 16 of the Act, 42 U.S.C. §4915.

The Court of Appeals for the District of Columbia, after carefully reviewing the Act and its legislative history, held that the EPA did not have such discretion and, instead, Congress had already determined, within the Act, that the interests of interstate commerce could only be served by the nationally uniform regulation of all railroad equipment and facilities. *AAR*, 562 F.2d at 1318.

No appeal was taken by the EPA. Instead, it returned to its rulemaking and promulgated the current regulations. The Solicitor General's new claim that *AAR* was wrongly decided, *see* U.S. Brief at 7 n.7, constitutes a collateral attack upon an unappealed decision otherwise binding upon the EPA. Moreover, in seeking a remand to the Court of Appeals for the Third Circuit, the Solicitor General asks for permission to press his collateral attack in a forum not otherwise available under the Act.

Finally, in joining in the U.S. Brief, the EPA seeks to avoid its representations to the *AAR* court attesting to its faithful compliance with the court's order. See *infra* Section C3. Appellees respectfully submit that the United States should not, as *amicus curiae*, be granted this forum in an attempt to avoid the implications of its status as a *party* to *AAR*.

C. The Solicitor General's Views On The Merits Are Incorrect.

1. The United States, by its own account, demonstrates that its new, narrow view of the Act's preemptive

scope is inconsistent with the Congressional objective of nationally uniform regulation. The Solicitor General concedes that:

> "[T]he state should probably be preempted from indirectly, as well as directly, regulating equipment and facilities that are federally regulated."

U.S. Brief at 7 n.8. Appellees agree and submit that a state property line standard[4] which controls total facility noise, including noise emitted by railroad equipment undeniably governed by specific federal standards (*e.g.* railroad locomotives), constitutes just such an indirect local regulation of federally regulated equipment. Despite this clear threat of conflicting regulations, the Solicitor General now urges a construction of Section 17(c)(1) of the Act that would subject our hypothetical railroad locomotive to different standards in every town, county and state through which it passed. This new construction clearly cheats the Congressional expectation behind the Act.

2. The Solicitor General, in suggesting such a narrow construction, overlooks convincing evidence that Congress understood the preemptive sweep of the railroad noise provisions of the Act to be quite broad. Senator Tunney's remarks, the source of legislative history proferred by the Solicitor General in his brief, makes this clear. In discussing Section 17(c)(2) of the Act — the provisions providing relief to states with special local conditions — Senator Tunney stated that this section was engrafted onto the legislation because of its otherwise broad preemption:

> "I have reviewed the amendment and it is in conformity with what the committee intended. The

4. "Property line standards" are standards governing total noise levels at the boundary of railroad facilities rather than standards for individual pieces of equipment within those facilities which require measurement at or near such equipment.

> report states there is a complete preemption and also orders the administrator in conjunction with the Secretary of Transportation to grant exemptions where there are special local conditions. So it is clear it is a total preemption.
>
> • • •
>
> It [the authority for EPA to regulate railroad noise emissions] was not initially in the bill, so we put in the preemption so that we would give the railroads and the carriers some awareness and some security that they would not have to abide by 50 different State jurisdictions and Lord knows how many tens of thousands of local jurisdictions. It is in the bill now. It is a complete preemption."

118 Cong. Rec. 37,318 (1972). None of the excerpts from the Congressional Record now cited in the U.S. Brief, including other statements by Senator Tunney, diminish the value of the above-quoted passage as authoritative evidence of Congressional intent to preempt, once the EPA had acted, state regulation of railroad noise.

Nor does either the language of the Act or the legislative history indicate that Congress intended to foreclose the EPA's ability to select among alternative methods for controlling railroad facility noise. Appellees assume that all parties, as well as *amicus curiae*, agree that there is more than one method of controlling noise emanating from railroad facilities. On the one hand, one might propose to limit noise levels at a facility's boundary regardless of the sources and levels of noise within the facility. In the alternative, one might seek to control the noise travelling across the facility's boundary by prescribing standards for noise produced within the facility at its sources. As indicated earlier, the question in this case is whether Congress intended to foreclose the EPA's ability to select among these (and perhaps other) options. Nothing in the Act or legislative history suggests that Congress so intended. In fact, the language of the Act, in

committing to the EPA questions of "best available technology" and "cost of compliance", signals that Congress left the selection of methodology to the EPA. *See*, Section 17(c)(1) of the Act, 42 U.S.C. §4916(c)(1).

3. Finally, the Federal Government now urges that the EPA's "preemptive intent" was narrow and that, despite its articulation of its position in 1981, the EPA never intended to preclude the enforcement of state property line regulations. Nowhere, however, does the Act leave to the EPA a determination of whether its set of regulations should or should not preempt local regulation. That question of legislative policy was already answered by Congress in the Act, and the EPA's views as to whether its regulations should, as a matter of policy, preempt state law are irrelevant. Instead, one should look to the EPA's contemporaneous statements only to determine what railroad equipment and facilities are governed by EPA regulations.

One has only to listen to the EPA's words, offered to the court in *AAR*, to conclude that, in its judgement at the time of rulemaking, the EPA had done as instructed by the *AAR* court and regulated *all* railroad equipment and facilities.

After the decision in *AAR*, and pursuant to the court's instructions, the EPA proposed further regulations including properly line standards similar to standards which the State of Delaware now seeks to impose on Appellees' facility. 44 Fed.Reg. 22,960-22,972 (1979). Following a comment period, the final (and current) regulations were promulgated. 45 Fed.Reg. 1,252 (1980), 40 C.F.R. pt. 201 (1983). The proposed property line standards for railroad facilities were not included in the final regulations.

In a report to the *AAR* court, the EPA listed the regulations that were promulgated, both before and after the court's ruling, and stated:

> Respondents believe that the cumulative effect of these standards, which were based on the noise abatement achievable through the application of the best available technology taking into consideration the cost of compliance, effectively regulate both railroad equipment and railroad facilities. The standards promulgated to date cover the major sources of noise from railroad equipment which in turn generate a large proportion of the noise emissions from rail facilities.
>
> Since the cumulative effect of regulating equipment used within railyards is also to regulate to a significant degree noise emissions from rail facilities, the parties agree that it is unnecessary for EPA to establish further property line facility emission standards specifically for railyards.
>
> In consideration of these facts, EPA intends to withdraw its proposal to promulgate a property line standard for rail facilities. Respondents agree with Petitioner AAR that EPA has already effectively regulated railroad "equipment and facilities". . . .

Status Report, *Association of Am. R.R. v. Costle*, No. 76-1353 (D.C. Cir. Nov. 12, 1981), A-77-80.

Appellees do not understand how one could conclude anything other than that the EPA, in 1981, judged its regulations to reach all railroad equipment and facilities. Indeed, any other conclusion suggests that the EPA was unfaithful to the court's instructions in *AAR*.

Even though Appellees disagree with the Solicitor General's recent claim that *AAR* was incorrectly decided, it should be noted here that the correctness of that decision is wholly irrelevant to a determination whether the EPA did as its words suggest. Correctly or not, the EPA was instructed to regulate "all railroad equipment and facilities". *AAR* at 1316. The EPA returned to the court saying it had done just that. Thereafter, the Act, and not

the EPA, declares that states may not impose an infinite variety of competing regulations upon such railroad equipment and facilities.

CONCLUSION

The Solicitor General apparently agrees that there is no substantial federal question involved in this case. He attempts, however, to use the United States' status as *amicus curiae* to collaterally attack well-reasoned determinations of legislative intent and statutory meaning made by a court singled out by Congress for such questions. Moreover, the United States' revisionist views are simply incorrect. Appellees' Motion to Affirm should be granted.

Respectfully submitted,

DUANE, MORRIS & HECKSCHER

By: _____

William E. Manning, Esquire
1220 Market Building
P.O. Box 195
Wilmington, Delaware 19899
(302) 571-5550

Dated: Nov. 21, 1986